

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
HUNTINGTON DIVISION

CHRISTOPHER FAIN, *et al.*,  
individually and on behalf of all others  
similarly situated,

*Plaintiffs,*

v.

WILLIAM CROUCH, *et al.*,

*Defendants.*

CIVIL ACTION NO. 3:20-cv-00740  
HON. ROBERT C. CHAMBERS

**JOINT MOTION FOR EXTENSION OF DEADLINES TO  
CONDUCT RULE 26(F) MEETING AND FILE RULE 26(F) REPORT**

The parties, through counsel, jointly move for an extension of the February 16, 2021 deadline to complete the Rule 26(f) meeting and the February 22, 2021 deadline to file a report of the same. The parties ask that those deadlines be extended such that the Rule 26(f) meeting shall be completed within 14 days of the resolution of the pending motions to dismiss and the parties shall file their Rule 26(f) report within 30 days of the resolution of the pending motions to dismiss. Given the parties' agreement, and for the reasons stated below, the Court should grant this request.

**RELEVANT BACKGROUND**

On November 12, 2020, Plaintiffs filed this proposed class action lawsuit alleging discrimination against transgender Medicaid and state employee health plan participants and bringing claims under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116, and the comparability and availability requirements of the federal Medicaid Act, 42 U.S.C. §§ 1396a(10)(A)-(B). (ECF No. 1.) On January 11, 2021, three separate motions to dismiss were

filed—one by Defendants Crouch, Beane, and the West Virginia Department of Health and Human Resources (WVDHHR); one by Defendant Cheatham; and one by Defendant The Health Plan of West Virginia, Inc. (ECF Nos. 20-25.) Defendants Crouch, Beane, and WVDHHR filed an additional motion to dismiss on February 2, 2021. (ECF Nos. 32-33.) The motions to dismiss address issues that are central to this litigation. (*See id.*) Plaintiffs responded to the motions brought by Defendants Cheatham and The Health Plan of West Virginia, Inc. on February 16, 2021. (ECF Nos. 39-40.) Plaintiffs' response to the motions filed by Defendants Crouch, Beane, and WVDHHR is due on March 2, 2021. (ECF No. 35.) On January 13, 2021, the Court issued an order requiring the parties to conduct their Rule 26(f) meeting by February 16, 2021, and to file their report of the same by February 22, 2021. (ECF No. 27.)

On February 9, 2021, counsel for all parties met to conduct the Rule 26(f) meeting. The discussion resulted in agreement that discovery in this case should not move forward until resolution of the pending motions to dismiss. The parties did, however, discuss and agree upon the following:

- The parties would seek leave through the instant motion to complete the 26(f) meeting within 14 days of the resolution of the pending motions to dismiss and to file their 26(f) report within 30 days of the resolution of the pending motions to dismiss.
- Should the Court grant the requested extension, the parties will file an agreed upon protective order and clawback agreement with their 26(f) report or, should they be unable to reach agreement, present the Court with competing versions.
- Should the Court grant the requested extension, the parties will file an agreed upon ESI protocol with their 26(f) report or, should they be unable to reach agreement, present the Court with competing versions.
- The parties agree that, after diligent review, there are no preservation issues that they are aware of at this time.
- The parties will exchange their initial disclosures no later than February 23, 2021 (i.e., 14 days following their February 9 meeting).

- The parties anticipate that discovery would likely involve, though not necessarily be limited to, the following: policies, procedures, manuals, and training documents relating to Defendants' coverage of gender-confirming care for transgender Medicaid participants and state health plan enrollees; all documents, ESI, and communications relating to health plan coverage for gender-confirming care; committee or meeting minutes, agendas, presentations, and notes relating to transgender patients and/or gender-confirming care; emails or communications with Medicaid participants, state health plan enrollees, strategic partners, and/or healthcare providers relating to the allegations in the complaint; and any other discovery related to class certification or the merits.
- The parties discussed the potential for settlement. At this time, the parties believe it likely that settlement negotiations would not be fruitful prior to the Court's decision on the pending motions to dismiss.

### **ARGUMENT**

Fed. R. Civ. P. 26(c) gives courts the discretion to stay Rule 26(f) obligations pending the outcome of a dispositive motion. *Blankenship v. Napolitano*, No. 2:19-CV-00236, 2019 WL 6173530, at \*2 (S.D.W. Va. Nov. 19, 2019). The parties agree that extending their deadlines to conduct a Rule 26(f) meeting and file a Rule 26(f) report is justified in this case for three reasons. First, the parties have discussed the case and ESI issues in enough detail to know that there are no concerns with preservation or spoliation of evidence that need to be addressed with the Court at this time. Second, given the importance and weight of the issues addressed in the pending motions to dismiss, the parties anticipate that the Court's forthcoming rulings may trigger an appeal. In light of this, granting a limited extension of the Rule 26(f) obligations at this point in the case will prevent wasting the time and effort of all parties involved and will make the most efficient use of judicial resources. Third, the parties believe there may be a chance for resolution following the Court's decision on the pending motions to dismiss. This weighs in favor of postponing the Rule 26(f) meeting and report deadlines, particularly in light of Plaintiffs' alleged Rule 23(b)(2) class and the lack of a Rule 23(b)(3) damages class in this case.

## CONCLUSION

For all of the reasons stated above, the parties request that the Court allow (1) the Rule 26(f) meeting to be completed within 14 days of the resolution of the pending motions to dismiss, and (2) the Rule 26(f) report to be filed within 30 days of the resolution of the pending motions to dismiss.

Dated: February 18, 2021

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